NO. 22556

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

NORVIN E. POWELL, III,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

JUN 2 1969

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APPELLEE'S BRIEF

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

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TOPICAL INDEX

TABLE OF AUTHORITIES

Statutes

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APPELLEE'S BRIEF

I

JURISDICTIONAL STATEMENT

On May 18, 1966, a six count indictment was returned against the appellant, NORVIN E. POWELL, III, by the Federal Grand Jury for the Southern District of California, Central Division [C. T. 2].[1/]

The indictment charged Powell with a violation of Federal laws relating to the possession and sale of marihuana.

Powell was found guilty on all six counts by a jury verdict on June 22, 1966 [C. T. 31].

1/ "C. T." refers to Clerk's Transcript of Record.

On July 12, 1966, appellant was sentenced to the custody of the Attorney General for five years on each of the six counts, with the sentences to run concurrently [C. T. 33].

Powell filed a timely Notice of Appeal on July 15, 1966 [C. T. 34]. The jurisdiction of the District Court was predicated on Title 18, United States Code, §3231; Title 21, United States Code, §176(a); and Title 26, United States Code, §4742(a). This Court has jurisdiction under Title 28, United States Code, §§1291 and 1294.

II

STATUTES INVOLVED

Title 21, United States Code, §176(a) provides in pertinent part as follows:

> "Whoever, knowingly, with intent to defraud the United States, receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of such marihuana after being imported or brought in, knowing the same to have been imported or brought into the United States contrary to law shall be imprisoned not less than five or more than twenty years and, in addition, may be fined not more than $20,000.
>
> "Whenever on trial for a violation of this subsection, the defendant is shown to have had the

marihuana in his possession, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains his possession to the satisfaction of the jury."

Title 26, United States Code, §4742(a) provides in pertinent part as follows:

> "It shall be unlawful for any person . . . to transfer marihuana, except in pursuance of a written order of the person to whom such marihuana is transferred, on a form to be issued for that purpose by the Secretary or his delegate."

Title 26, United States Code, §7273(b) provides in pertinent part as follows:

> "Whoever commits an offense . . . described in . . . §4742(a) shall be imprisoned not less than five years or more than 20 years, and in addition, may be fined not more than $20,000."

III

STATEMENT OF THE CASE

Powell was indicted on May 18, 1966 by the Federal Grand Jury for the Southern District of California, Central Division. Counts One and Four of the six-count indictment charged that he

knowingly and unlawfully received, concealed, and facilitated the concealment and transportation of 1,604.1 grams of marihuana on April 11, 1966, and 1,498.25 grams of marihuana on April 27, 1966. Counts Two and Five of the indictment charged that he knowingly and unlawfully sold and facilitated the sale of the aforementioned marihuana on the said dates. Counts Three and Six of the indictment charged that he knowingly and unlawfully sold the aforementioned marihuana on the said dates, without obtaining from the purchaser written orders on forms issued for that purpose by the Secretary of the Treasury [C. T. 2].

Trial by jury was held on June 21 and 22, 1966, before the Honorable William N. Goodwin, United States District Judge, at which time Powell was found guilty on all counts [C. T. 31].

On July 12, 1966, Powell was sentenced to the custody of the Attorney General for five years on each of the six counts, with the sentences on Counts Two, Three, Four, Five and Six to begin and run concurrently with the sentence on Count One [C. T. 33].

Powell filed a timely notice of appeal on July 15, 1966 [C. T. 34].

STATEMENT OF FACTS

On April 11, 1966, an agent of the Federal Bureau of Narcotics, William Turnbou, went to the residence of Powell with a special employee of the Federal Bureau of Narcotics named Leroy C. Dukes, alias Abdula. Powell was not home when Agent Turnbou and Dukes arrived at the residence, but he appeared about 30 minutes later. Dukes introduced Agent Turnbou to Powell as the person who wanted marihuana. Agent Turnbou asked Powell if he could get anything other than marihuana. Powell responded that he could get heroin, but payment would have to be in advance of delivery. He also told Agent Turnbou that he could obtain marihuana for $50 a kilogram if the money was paid in advance to the "connection", who went to Mexico to get the marihuana [R. T. 13-15, 190, 29]. 2/

While at Powell's residence, Agent Turnbou told him he wanted to buy two kilograms of marihuana. Powell said the price would be $135 per kilogram. Agent Turnbou would not advance the money to him. Powell then left the residence, taking his bass fiddle, and returned with two packages of marihuana which he gave to Agent Turnbou who, in turn, gave Powell $270. The two of them then conversed about future transactions for the

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2/ "R. T." refers to Reporter's Transcript of Record.

purchase of marihuana and heroin by Agent Turnbou. Thereafter, Agent Turnbou and Dukes left Powell's residence [R. T. 15-16].

On Apeil 22, 1966, Agent Turnbou and Dukes met with Powell at his residence. Agent Turnbou and Powell had a discussion about the purchase of marihuana. Powell said he could not do business on that date, but would be able to in about a week [R. T. 17, 35].

At approximately 10:30 P. M. on April 27, 1966, Agent Turnbou and Dukes went to Powell's residence. Agent Turnbou told Powell he wanted two more kilograms of marihuana. Powell said he would have it shortly. He left his residence and returned about 10 minutes later with two packages of marihuana. Agent Turnbou then paid Powell $270. On the occasion of this transaction, Agent Turnbou observed Powell smoking what he (Powell) said was a marihuana cigar [R. T. 17-18, 37, 45].

Powell did not obtain from Agent Turnbou a Treasury order form at the time of either of the sales of marihuana [R. T. 20].

Dukes met Powell in 1965 at a club known as "Mother Neptune's." Powell and Dukes both played the bass fiddle at the club. Dukes would go to the club almost every night and would usually see and talk to Powell. Dukes went to Powell's residence several times in late 1965. On those occasions, he and Powell would talk about music and narcotics [R. T. 56-59].

In February 1966, while Powell and Dukes were at the club, Powell told Dukes he could sell any amount of narcotics.

After Dukes learned that Powell was selling narcotics, and after he talked to agents of the Federal Bureau of Narcotics, he asked Powell for a "connection" for narcotics [R. T. 61-62, 72].

In March 1966, Dukes went to Powell's residence several times. On one occasion, Powell told Dukes he was still prepared to sell narcotics and had "connections" if Dukes wanted "anything in any amount". Dukes told Powell he was not interested in buying narcotics [R. T. 71-72].

During March and April 1966, Powell was continually telling Dukes he had narcotics to sell. In early April 1966, Dukes called Powell. Powell told him he still had narcotics to sell and practically forced Dukes to buy narcotics [R. T. 78-79].

In March 1966, Dukes told Powell he had someone who was interested in buying narcotics. Powell said "Okay, you get that party, and when you get them, make sure that they're all right" [R. T. 81-82],

Four or five nights after Powell's first sale of marihuana to Agent Turnbou on April 11, 1966, Dukes talked to Powell at "Mother Neptune's". Powell said he was satisfied with what had happened the night of the first sale to Agent Turnbou and talked about a future transaction. Powell said he was ready to make another sale whenever Dukes was ready. Dukes conveyed this information to Agent Turnbou who decided to wait about one and a half weeks before another transaction [R. T. 99-100].

Dukes never used narcotics nor supplied narcotics to anyone [R. T. 55, 59]. He began cooperating with the Federal

Bureau of Narcotics in November 1965, in the belief that he would be given consideration with respect to a charge then pending against him. Dukes was not promised anything for his cooperation [R. T. 75].

Powell testified he met Dukes in August 1965 and did not see him again until January 1966 at "Mother Neptune's". Powell saw Dukes about a dozen times in January 1966. Powell had an initial discussion about narcotics with Dukes in February 1966, in Dukes' car, at which time Dukes sniffed cocaine and offered to sell cocaine to Powell [R. T. 106-110].

Powell testified that Dukes tried to sell narcotics to someone in the club in late March 1966. Several times Powell cautioned Dukes about to whom he sold narcotics [R. T. 114].

Powell did not deny the two sales of marihuana to Agent Turnbou on April 11, 1966 and April 27, 1966, but said that he was acting as the "front" for Dukes at Dukes' strong urging [R. T. 116-117, 127-128, 132-135, 142-143, 158]. Powell denied being a supplier of marihuana and denied trying to get Dukes to buy narcotics from him since February 1966 [R. T. 149].

Powell admitted that he told Agent Turnbou that he could supply any amount of narcotics, but claimed he only said that at the request of Dukes [R. T. 150].

Powell admitted that he told Agent Turnbou that he could obtain marihuana for $50 per kilogram if the money was received by the "connection" in advance to take with him to Mexico, but he claimed he only said that at the request of someone he did

not name [R. T. 185].

Powell admitted marihuana convictions in 1960 and 1961 or 1962 [R. T. 150-151].

V

ARGUMENT

A. THE TRIAL COURT JUDGE MAY PROPERLY COMMENT TO THE JURY ON THE CREDIBILITY OF WITNESSES.

Powell contends that the trial court judge's comment to the jury concerning the credibility of Reynaldo Navarro, a witness for Powell, was prejudicial error. Navarro testified that he had obtained marihuana from Dukes in January 1966, but admitted he had told a different story when he was prosecuted in the State court for possession of the marihuana. Navarro admitted that he had talked to Powell in jail prior to testifying in this case [R. T. 120-125]. The trial court judge told the jury it was his opinion that Navarro's testimony was not worthy of belief. However, prior to such comment, the judge instructed the jury that any comments he made were only expressions of his own opinion as to the facts, and the jury could disregard them entirely, since the jurors were the sole judges of the facts [R. T. 205]. Later, the trial court judge repeated his admonition to the jury that they were the sole judges of the facts and of the credibility of the witnesses who had testified in the case [R. T. 209].

No objection was made by Powell to the judge's comments [R. T. 224].

The United States Supreme Court and this Court have repeatedly upheld the right of a trial court judge to comment on the credibility of witnesses, provided the comment is fair and the jury is clearly instructed that they are the sole judges of the facts and may disregard such comments.

United States v. Murdock, 290 U.S. 389, 394 (1933);

Fletcher v. United States, 313 F. 2d 137, 138-140 (9th Cir. 1963), cert. denied, 374 U.S. 812 (1963);

Smith v. United States, 305 F. 2d 197, 205 (9th Cir. 1962), cert. denied, Corey v. United States, 371 U.S. 890 (1962);

Henry v. United States, 186 F. 2d 521 (9th Cir. 1951).

See also:

Honce v. United States, 299 F. 2d 389, 398-401 (8th Cir. 1962).

B. THE TRIAL COURT JUDGE MAY PROPERLY ASK QUESTIONS OF WITNESSES.

Powell testified on cross-examination that he got the telephone number of a source of supply for marihuana from Dukes, that he memorized the number, and called the number for Dukes on April 11, 1966. At the time of trial, he indicated he could remember four digits of the number, and the trial court judge asked him to give the first two digits of the number [R. T. 173]. No objection to the question was made by Powell's counsel. Powell contends that the judge's question constitutes prejudicial error.

This Court has explicitly upheld the right of a trial court judge to interrogate witnesses.

> "It is within the province of a federal trial judge to interrogate witnesses and also to comment on their testimony if he so desires."
>
> Fletcher v. United States, supra, at 139.

As stated in Smith v. United States, supra, at 205:

> "A federal trial judge, . . . is more than a moderator or umpire. He has the responsibility to preside in such a way as to promote a fair and expeditious development of the facts unencumbered by irrelevancies. He may assist the jury by commenting upon the evidence and this may include an appraisal of

the credibility of witnesses providing the comment is fair and the jury is clearly instructed that they are to find the facts and may disregard such comments."

As previously noted, Powell did not make an objection to either the trial court judge's interrogation or comments to the jury. The United States Supreme Court and this Court have repeatedly held that they will not consider claims of error in the trial raised for the first time on appeal, unless there is a showing of manifest injustice.

Johnson v. United States, 318 U.S. 189, 200 (1943);
Eason v. Dickson, 390 F.2d 585, 589 (9th Cir. 1968);
Collozo v. United States, 370 F.2d 316, 317 (9th Cir. 1966);
Gilbert v. United States, 307 F.2d 322, 325 (9th Cir. 1962);
Hebets v. Scott, 152 F.2d 739 (9th Cir. 1945).

See also:

Whaley v. United States, 394 F.2d 399, 400 (10th Cir. 1968).

Powell has made no showing of manifest injustice by the trial court judge's actions.

C. ALLOWING MARIHUANA ADMITTED INTO EVIDENCE TO GO TO JURY ROOM DOES NOT CONSTITUTE PREJUDICIAL ERROR

After the trial court judge finished instructing the jury, he asked counsel for both parties whether there was any objection to sending the exhibits to the jury room for use in the jury's deliberation. (The marihuana packages were the only exhibits in the case that were admitted into evidence [R. T. 21]). There was no objection by either side [R. T. 223-224]. Therefore, this issue is not properly raised on appeal (See supporting argument in Paragraph B, hereinabove).

Even assuming for purposes of argument, that a proper objection had been made by Powell, the marihuana was properly allowed to go to the jury room. This Court has held that the sending of exhibits to the jury room is a matter entirely within the discretion of the trial court judge.

> Shayne v. United States, 255 F. 2d 739 (9th Cir. 1958), cert. denied, 358 U.S. 823 (1958).

See also:

> Wall v. United States, 384 F. 2d 758 (10th Cir. 1967).

Furthermore, the jurors are instructed that they must weigh and consider all the evidence in arriving at their verdict [R. T. 207]. Since the marihuana in question was part of the evidence, it was proper that it be considered by the jury in its deliberations.

The Karn and Kaplan cases, cited by Powell, are not in point. Karn concerns exhibits that were introduced on a count of

the indictment that was dismissed before the conclusion of the trial, but which exhibits were sent to the jury room during deliberations on a second count of the indictment. Therefore, the jury was considering exhibits that were not even admitted into evidence. The Kaplan case does not even concern the issue of evidence going to the jury.

D. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING POWELL'S MOTION FOR A CONTINUANCE OF THE TRIAL.

On May 31, 1966, Powell appeared in court for arraignment and plea to the indictment. The court appointed attorney Louis Licht as counsel for Powell. Powell entered a plea of not guilty to all counts, and trial was set for June 20, 1966, at 9:30 A. M. [C. T. 9].

On June 20, 1966, Powell appeared for trial with attorney Sam Bubrick, who had been retained by him. The trial was continued to the following day at 9:30 A. M. [C. T. 10]. On June 21, 1966, Powell made a motion for a continuance before United States District Judge Francis C. Whelan, which motion was denied. United States District Judge William N. Goodwin was assigned the trial of the case. Powell renewed his motion before Judge Goodwin on the same day and the motion was again denied. In support of said motion, Mr. Bubrick alleged that he had just come into the case and was informed by Powell that witnesses Powell wished to call in his defense were in Mexico City. No

showing was made to the court as to the names of the witnesses, their anticipated testimony, or whether they were subject to the subpoena power of the court. Nor was there a showing as to what prejudice would result to Powell if the continuance was not granted [See Supplemental Transcript of Record filed with this Court on January 15, 1969].

In view of Powell's testimony at trial that he sold the marihuana in question, but only as a "front" for Dukes, it is clear that no prejudice to Powell resulted from the denial of the continuance.

In Evalt v. United States, 382 F. 2d 424 (9th Cir. 1967), at page 427, this Court said:

> "The granting of a continuance to procure an absent witness rests in the sound discretion of the trial court and will not be reviewed on appeal in the absence of a clear showing of abuse."

See also:

Morgan v. United States, 380 F. 2d 686 (9th Cir. 1967);

Miller v. United States, 351 F. 2d 598 (9th Cir. 1965), cert. denied, 382 U. S. 1027 (1965);

Lemons v. United States, 337 F. 2d 619 (9th Cir. 1964).

E. THE USE OF INFORMANTS BY FEDERAL NARCOTICS AGENT TO APPREHEND VIOLATORS OF NARCOTICS LAW IS PERMISSIBLE.

At the time Dukes introduced Agent Turnbou to Powell, he had a narcotics charge pending against him and had agreed to cooperate with the Federal Bureau of Narcotics. Powell contends that the Government's use of Dukes to obtain evidence against Powell is not permissible. As authority, he cites Williamson v. United States, 311 F. 2d 441 (5th Cir. 1962). Williamson did not hold that an informer cannot be utilized, but rather critized an arrangment between Government agents and an informer whereby the informer was paid a specified amount for obtaining evidence against specified persons (See p. 444). The facts of the instant case are clearly distinguishable.

In the instant case, Dukes was not working for the Government pursuant to any fee arrangment. Dukes himself maintained that no promises were made to him by the Government in exchange for his cooperation. He stated that he agreed to cooperate with the Government after talking to his attorney and in the belief that he would get consideration in the charges pending against him for his cooperation [R. T. 75].

The United States Supreme Court and this Court have many times upheld the use of informers by the Government in the apprehension of narcotics law violators.

Masciole v. United States, 356 U. S. 386 (1958);

Sherman v. United States, 356 U.S. 369 (1958);

Sorrells v. United States, 287 U.S. 435, 551 (1932);

Gonzales v. United States, 251 F. 2d 298 (9th Cir. 1958);

Trice v. United States, 211 F. 2d 513, 516 (9th Cir. 1954), cert. denied, 348 U.S. 900 (1954).

This court stated in Trice, supra, at 516:

> "So great is the menace [the use of narcotics] that the hiring of disreputable persons to act with the narcotics agents in deceit and by despicable methods to catch distributors of [narcotics] has been sanctioned by the highest courts as the only successful manner to combat the evil."

Parenthetically, it must be noted that the objection to use of evidence obtained with the help of an informant should have been raised by a motion to suppress. Since no such motion was made by Powell, the issue is not properly raised on appeal.

Kuhl v. United States, 370 F. 2d 20, 21 (9th Cir. 1966).

F. THE INSTRUCTION TO THE JURY OF §4744(a) OF TITLE 26, UNITED STATES CODE, DOES NOT CONSTITUTE REVERSIBLE ERROR.

Powell was not charged with violating 26 United States Code, §4744(a). However, for a reason that does not appear in

the record, the trial court judge read said section to the jury in his instructions. There was no objection to the instructions [R. T. 224]. The law is abundantly clear that where no objection is made to an instruction at trial, the party failing to object cannot complain on appeal about the instruction given.

> Singer v. United States, 380 U.S. 24, 38 (1965);
>
> White v. United States, 394 F. 2d 49, 55-56 (9th Cir. 1968);
>
> Cooper v. United States, 282 F. 2d 527 (9th Cir. 1960).

Since Powell was not charged with a violation of Title 26, United States Code, §4744(a), no prejudice to him resulted from the reading of said section to the jury.

The trial court judge correctly instructed the jury as to the two essential elements needed to prove the offense of Title 26, United States Code, §4742(a) [R. T. 216]. The record is clear that Powell did not obtain any required order form from Agent Turnbou at the time of the two sales of marihuana [R. T. 20].

G. IT IS NOT NECESSARY TO CONSIDER THE VALIDITY OF POWELL'S CONVICTIONS ON COUNTS ONE, TWO, FOUR AND FIVE OF THE INDICTMENT.

Where a defendant is sentenced to the same period of incarceration for convictions on more than one count of an indictment and the sentences are to run concurrently, the fact that defendant was validly convicted on any one count precludes

reversal regardless of the validity of the convictions on the other counts.

Lawn v. United States, 355 U.S. 339, 359 (1958);

Hirabayashi v. United States, 320 U.S. 81, 85 (1943);

Blunt v. United States, 404 F.2d 1283, 1289 (D.C. Cir. 1968);

Sherwin v. United States, 320 F.2d 137, 156 (9th Cir. 1963);

Noah v. United States, 304 F.2d 317, 318 (9th Cir. 1962);

Russell v. United States, 288 F.2d 520, 521-522 (9th Cir. 1961).

The appellee is aware of the recent decision of the United States Supreme Court in Leary v. United States, ___ U.S. ___ (1969), as it affects the presumptions contained in Title 21, United States Code, §176(a).

However, in the instant case, Powell was sentenced to the custody of the Attorney General for five years on each of the six counts of the indictment, with the sentence on all counts to commence and run concurrently [C.T. 33]. Since the convictions on counts Three and Six, which charged violations of Title 26, United States Code, §4742(a), are valid and not subject to attack on appeal, consideration of the validity of the convictions on Counts One, Two, Four and Five is not necessary.

VI

CONCLUSION

For the foregoing reasons, appellant's conviction should be affirmed.

Respectfully submitted,

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